



UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for
Oceans and Atmosphere
Washington, D.C. 20230

MAY 12 1998

The Honorable John H. Zirschky, Ph.D.
Acting Assistant Secretary of the Army
Department of the Army
Washington, D.C. 20310

SA8051507

Dear Dr. Zirschky:

Pursuant to Part IV (f)(2) of our 1992 Memorandum of Agreement under Section 404 (q) of the Clean Water Act, I request your review of a decision by the U.S. Army Corps of Engineers, Mobile District (COE-MD), to authorize the project advertised by the Public Notice MS96-02828-U dated August 22, 1996, and submitted by the Mississippi State Port Authority (MSPA).

The National Oceanic and Atmospheric Administration (NOAA) supports sustainable development of the port. However, we are concerned that the mitigation sequencing guidelines under Section 404(b)(1) of the Clean Water Act have not been adequately applied to this project. Consequently, the mitigation agreed to by the COE-MD is undefined in terms of habitat function, and appears inadequate to compensate for impacts to NOAA trust resources. Issues raised in our previous letters (National Marine Fisheries Service letters dated September 10, 1996, October 6, 1997, and January 8, 1998) related to avoidance and minimization of impact, and secondary and cumulative project effects, also remain unresolved.

The MSPA proposes to impact 101 acres of estuarine habitat by: (1) filling 84 acres of open water and subtidal bottoms and 2 acres of a wetland mitigation site, (2) dredging 15 acres of subtidal bottoms, and (3) constructing a 900-foot by 150-foot pier. The purpose of the project is port expansion in Mississippi Sound at Gulfport, Harrison County, Mississippi. NOAA has repeatedly objected to the permit due to the project's substantial and unacceptable impacts on aquatic resources of national importance and lack of adequate mitigation. We request that you deny this permit and direct the MSPA to pursue less damaging alternatives, such as providing certain cargo handling needs at off-site areas, and obtaining adequate compensatory mitigation to off-set unavoidable impacts. We also believe that the project is significant and should be addressed with an environmental impact statement (EIS), preferably in conjunction with a Special Area Management Plan.

Mississippi Sound provides important forage, cover, spawning, and nursery areas for a variety of important commercial and recreational finfish and shellfish, including penaeid shrimp, blue crab, red drum, red snapper, flounder, and others. The natural sand and mud bottoms in Mississippi Sound are utilized by these fish species to meet their feeding, growth, and survival.



THE DEPUTY ADMINISTRATOR

Shrimp, reef fish, coastal migratory pelagics, and red drum are currently managed by the Gulf of Mexico Fishery Management Council under Fishery Management Plans that identify nursery areas, such as the proposed project site, as habitats of concern.

Mississippi's estuaries provide the resource base for commercial and marine recreational fishing in Mississippi and the neighboring Gulf of Mexico area. The dockside value of commercial fish landings in Mississippi averaged almost \$38 million for the 3 years between 1994 through 1996. Recreational fisheries also contribute significantly to the state and national economies. In 1991, approximately 125,000 people spent more than \$59 million fishing in Mississippi's coastal waters, supporting more than 2,000 jobs, generating approximately \$4 million in Federal income tax, and approximately \$3.5 million in state sales tax.

The MSPA's proposed mitigation plan consists of replacing a causeway with a bridge to encourage the re-establishment over 15 years of 24 acres of marsh within Graveline Bayou; providing stormwater treatment; improving water quality within their small craft harbor; removing a canal plug at Discovery Bay; and contributing \$1,000,000 to the State's coastal preserve acquisition program. NOAA believes the proposed mitigation is inadequate compensation for project impacts because the proposed mitigation projects will do little to replace the open water benthic habitat functions that will be lost through the proposed dredging and fill.

The Mississippi coastal area is experiencing rapid development. The proposed project will add to the primary and secondary environmental problems associated with coastal development. Federal and state regulatory and resource agencies are currently working together in a comprehensive resource management planning effort to address these development issues. A March 4, 1998, Memorandum for the Director of Civil Works from the Deputy Assistant Secretary (Policy and Legislation) regarding Mississippi Coastal Area Casino Permit Applications, states that substantial concerns regarding cumulative impacts have not been adequately addressed. This memorandum directed the COE-MD to prepare a programmatic environmental impact statement (PEIS) for the casino permits. A follow-up memorandum, dated April 6, 1998, clarifies that the PEIS should include all large coastal developments in Mississippi. NOAA believes that the proposed port expansion should be included in the PEIS. However, the COE-MD is of the position that since their permit decision had been made prior to the memorandums, the project will not be addressed in the PEIS or by an independent EIS.

In summary, NOAA has determined that Federal authorization of the proposed port expansion will cause substantial and unacceptable adverse impacts on aquatic resources of national importance. We recommend the project be modified to reduce project impacts, provide adequate mitigation to avoid a net loss of habitat for living marine resources, and address secondary and cumulative impacts associated with a project of this magnitude. The enclosed information paper and attachments detail the reasons why NOAA believes that this permit should not be issued as proposed.

I appreciate your consideration of our concerns.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sally Fogell for".

Terry D. Garcia

Enclosure



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

12 JUN 1998

REPLY TO
ATTENTION OF

Honorable Terry D. Garcia
The Assistant Secretary for
Oceans and Atmosphere
United States Department of Commerce
Washington, D. C. 20230

Dear Mr. Garcia:

This is in response to your letter of May 12, 1998, in which you requested our review of a decision by the Army Corps of Engineers, Mobile District (COE-MD), to authorize the project advertised by the Public Notice MS96-02828-U dated August 22, 1996, and submitted by the Mississippi State Port Authority (MSPA).

Your request for elevation was made pursuant to Part IV of the 1992 Section 404(q) Memorandum of Agreement (MOA) between the Army and the Department of Commerce (DOC) and contends that authorization of the proposed port expansion will cause substantial and unacceptable adverse impacts on aquatic resources of national importance (ARNI). You recommended that the project be modified to reduce project impacts, provide adequate mitigation to avoid a net loss of habitat for living marine resources, and address secondary and cumulative impacts associated with a project of this magnitude.

We have carefully reviewed the concerns raised in your letter and analysis, the Mobile District's decision documents and draft permit, and information from the applicant. Our review included an on-site visit and meeting with representation by the National Marine Fisheries Service, the Corps Mobile District, and the Mississippi State Port Authority. Based upon our evaluation, we agree that, portions or all of the Mississippi Sound may qualify as ARNI's. However, we disagree that substantial and unacceptable adverse impacts will result from the Port Expansion to be approved by the Mobile District's proposed permit.

Our determination is based upon the fact that the area of expansion represents only 0.00018 percent of the 470,000 acres comprising the Mississippi Sound. This impact, when weighed against the projects benefits and the current

DCW

mitigation plan, will not result in substantial and unacceptable impacts to aquatic resources of national importance. Further, the Port's mitigation plan, as currently configured, provides for \$2.7 million of mitigation, which should provide enough out of kind resources to compensate for the loss of the 84 acres.

However, we share NOAA's concern about the cumulative effects of using the State's acquisition fund to replace Gulf bottom habitat functions lost to development, with wetlands in coastal areas. In this case, the mitigation is undefined in terms of wetland type and habitat function, and without long term studies it would be difficult to determine what would be adequate to compensate for impacts to bay bottom. A major component of the Gulfport proposed mitigation plan is a \$1,000,000 contribution to the State's Coastal Preserve Program managed by the Mississippi Department of Marine Resources (MDMR). The district documentation and draft permit does not identify any specific compensatory benefits that will result from the applicants' donation of money to the MDMR. Further it leaves all decisions concerning expenditure of those funds to the State. In the past such contributions have been used to acquire coastal land. This represents the "what is best for the environment" approach when techniques for comparing impact and mitigation are lacking. Our view, however, is that the Corps and Federal resource agencies need to partner with the State to ensure that there is ecological value flowing from the Coastal Preserve Program, when funds are being sent to the program as a result of the provisions of Federal permits.

You also recommended that this project be the subject of an Environmental Impact Statement (EIS) or be included in the Programmatic EIS being developed for large coastal development in Mississippi. We are pleased to report that the district fully intended to consider the direct, secondary and cumulative impacts of the Port expansion in that PEIS, and will recognize that in their documentation.

In light of the findings summarized above, additional review pursuant to the MOA is not required, and we will advise the Corps Mobile District to proceed with the final permit decision in accordance with the MOA. However, we will also ask that the documentation for the permit and the

permit itself, be modified as necessary to accomplish the following:

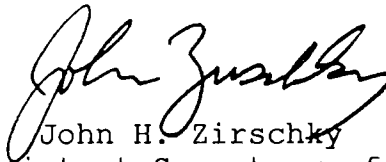
- a. The documentation for the mitigation should include monitoring plan for the quality and quantity of marsh reestablishment. National Marine Fisheries Service (NMFS) should be asked to participate in the monitoring and evaluation. If the mitigation success criteria are not met, the Permittee in cooperation with NMFS and the other resource agencies, could then develop and implement an alternative mitigation plan for the Corps to approve.
- b. The documentation for the Mississippi Department of Marine Resources (MDMR) purchase of Coastal Preserve sites should include provisions for NMFS and the other resources agencies to provide the Corps recommendations on the specific types (or ratios) of wetlands they would like to see purchased (i.e. intertidal marsh, high marsh, forested wetlands, pine flatwoods, upland buffers). The Corps would then meet with MDMR to encourage that the Port's mitigation dollars be spent on those preferred types of wetlands. The MDMR should also provide as a part of its normal audit process, documentation of how the mitigation funds were expended.
- c. The Permit documentation and permit should reflect that the Port will not commence construction of Phase II or Phase III until the MDMR reaffirms Coastal Zone Consistency and the District reviews the circumstances and conditions of the permit in accordance with 33 CFR 325.7(a). This review will include compliance with the mitigation plan success criteria.
- d. The permit documentation should recognize that the Programmatic Environmental Impact Statement for coastal Harrison and Hancock Counties will include the cumulative impact of the Port expansion.

We believe this will allow the district to take an objective posture concerning future circumstances in these important areas and to perhaps further minimize or mitigate impacts, should conditions at the site change. It will also facilitate interagency exchanges concerning the Port's mitigation.

Although in this case we disagree on the need to elevate the case, we share your desire to protect the Nation's aquatic resources and the public interest. Your staff is to be commended for raising the case to this level, and bringing to light potential changes that could be made to provide additional environmental benefits. We appreciate that, and have taken the steps outlined above in response to those enlightenments.

Should you have any questions or comments concerning our decision in this case, do not hesitate to contact me or Mr. Chip Smith, Assistant for Environment and Regulatory Affairs, at telephone (703) 693-3655.

Sincerely,

A handwritten signature in dark ink, appearing to read "John Zirschky", written in a cursive style.

John H. Zirschky
Acting Assistant Secretary of the Army
(Civil Works)



DEPARTMENT OF THE ARMY

U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECW-OR

23 JUN 1998

MEMORANDUM THRU COMMANDER, SOUTH ATLANTIC DIVISION

FOR COMMANDER, MOBILE DISTRICT

SUBJECT: National Oceanic and Atmospheric Administration (NOAA), Elevation of Section 10/404 Permit Decision, Mobile District Permit 96-02828-U

1. On 11 June 1998, the Acting Assistant Secretary of the Army (Civil Works) (AASA(CW)) denied the Department of Commerce (DOC)/NOAA request for higher level review of the Mobile District's proposed permit to the Mississippi Port Authority at Gulfport. Enclosed is a copy of the AASA(CW) letter to DOC.
2. In accordance with Part IV (g)(1) of the Memorandum of Agreement with DOC, the District may proceed with the final decision. Although the review of this case indicated the District's decision was made in accordance with all applicable policies and regulations, the AASA(CW) has also requested that the District take the following steps prior to final action on the permit:
 - a. The documentation for the mitigation should include a monitoring plan for the quality and quantity of marsh reestablishment. National Marine Fisheries Service (NMFS) should be asked to participate in the monitoring and evaluation. If the U.S. Army Corps of Engineers determines that the mitigation success criteria are not met, the permittee in cooperation with NMFS and the other resource agencies, could then develop and implement an alternative mitigation plan for the Corps to approve.
 - b. The documentation for the Mississippi Department of Marine Resources (MDMR) purchase of Coastal Preserve sites should include provisions for NMFS and the other resources agencies to provide the Corps recommendations on the specific types (or ratios) of wetlands they would like to see purchased (e.g. intertidal marsh, high marsh, forested wetlands, pine flatwoods, upland buffers). The Corps would then meet with MDMR to encourage that the Port's mitigation dollars be spent on those preferred types of wetlands. The MDMR should also provide as a part of its normal audit process, documentation of how the mitigation funds were expended.


CECW-OR

SUBJECT: National Oceanic and Atmospheric Administration (NOAA), Elevation of Section 10/404 Permit Decision, Mobile District Permit 96-02828-U

- c. The permit documentation and permit should reflect that the Port will not commence construction of Phase II or Phase III until the MDMR reaffirms Coastal Zone Consistency and the District reviews the circumstances and conditions of the permit in accordance with 33 CFR 325.7(a). This review will include compliance with the mitigation plan success criteria.
 - d. The permit documentation should recognize that the Programmatic Environmental Impact Statement for coastal Harrison and Hancock Counties will include the cumulative impact of the Port expansion.
3. Should you have any questions or comments concerning our decision, please contact Mr. Jack Chowning, Regulatory Branch, at (202) 761-1781.

FOR THE COMMANDER

Encl


RUSSELL L. FUHRMAN
Major General, USA
Director of Civil Works